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In the Supreme Court of the United States

OCTOBER TERM, 1978

SEABOARD COAST LINE RAILROAD COMPANY, ET AL.,

PETITIONERS,

v.

SEABOARD ALLIED MILLING CORP., ET AL.,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In the Supreme Court of the United States

October Term, 1978

No.

SEABOARD COAST LINE RAILROAD COMPANY, ET AL.,

Petitioners,

v.

SEABOARD ALLIED MILLING CORP., ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, Seaboard Coast Line Railroad Company, Louisville and Nashville Railroad Company, Illinois Central Gulf Railroad Company and St. Louis-San Francisco Railway Company, respectfully pray that a Writ of Certiorari issued to review the Judgment and Opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 16, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 570 F.2d

1349 (1978) appears in the Appendix hereto.[1] The action taken by the Interstate Commerce Commission, which was appealed to the United States Court of Appeals for the Eighth Circuit, is evidenced by two documents of the Commission also included in the Appendix hereto.[2]

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on February 16, 1978. A timely Petition for Rehearing *en banc* was denied on May 12, 1978, and this Petition for Writ of Certiorari was timely filed on October 10, 1978.[3] This Court's jurisdiction is invoked under 28 U.S.C. §§1254(1).

STATUTES INVOLVED[4]

Interstate Commerce Act, Section 15(17), 49 U.S.C.A. §15(17)

> Within 1 year after February 5, 1976, the Commission shall establish, by rule, standards and expeditious procedures for thr establishment of railroad rates based on seasonal, regional, or peak-period demand for all rail services. Such standards and procedures shall be designed to (a) provide sufficient incentive to shippers to reduce peak-period shipments, through re-scheduling and advance planning; (b) generate additional revenues for the railroads; and (c) improve (i) the utilization of the national supply of freight cars, (ii) the movement of goods by rail, (iii) levels of employment by railroads, and (iv) the financial stability of markets

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1/ Appendix B.
2/ Appendices D and E.
3/ An extended filing date granted by Orders of Mr. Justice Blackmum.
4/ Additional statutory authorities relied upon by Petitioners are reproduced in whole or in part in Appendix F.

served by railroads. Following the establishment of such standards and procedures, the Commission shall prepare and submit to the Congress annual reports on the implementation of such rates, including recommendations with respect to the need, if any, for additional legislation to facilitate the establishment of such demand-sensitive rates.

Interstate Commerce Act, Section 13(1), 49 U.S.C.A. §13(1)

(1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Interstate Commerce Act, Section 15(8)(a), 49 U.S.C.A. §15

(8)(a) Whenever a schedule is filed with the Com-

mission by a common carrier by railroad stating a new individual or joint rate, fare, or charge, or a new individual or joint classification, regulation, or practice affecting a rate, fare, or charge, the Commission may, upon the complaint of an interested party or upon its own initiative, order a hearing concerning the lawfulness of such rate, fare, charge classification, regulation, or practice. The hearing may be conducted without answer or other formal plrading, but reasonable notice shall be provided to interested parties. Such hearing shall be completed and a final decision rendered by the Commission not later than 7 months after such rate, fare, charge, classification, regulation, or practice was scheduled to become effective, unless, prior to the expiration of such 7-month period, the Commission reports in writing to the Congress that it is unable to render a decision within such period, together with a full explanation of the reason for the delay. If the final decision of the Commission is not made within the applicable time period, the rate, fare, charge, classification, regulation, or practice shall go into effect immediately at the expiration of such time period, or shall remain in effect if it has already become effective. Such rate, fare, charge, classification, regulation or practice may be set aside thereafter by the Commission if, upon complaint of an interested party, the Commission finds it to be unlawful.

QUESTIONS PRESENTED

1) Has the Interstate Commerce Commission adjudicated the lawfulness of a railroad-initiated rate when it declines to exercise its discretionary powers under Section 15(8) of the Interstate Commerce Act to suspend and investigate a tariff publication?

2) Can the powers to suspend and to investigate be "separate and distinct" for the purpose of judicial review when

each power, by the terms of the statute, is wholly dependent on the other for existence?

3) Has a protestant to a new rate publication exhausted its administrative remedies by the filing of a protest under Section 15(8) of the Interstate Commerce Act requesting suspension and investigation?

REASONS FOR GRANTING A WRIT OF CERTIORARI

The lower Court's Decision is in direct conflict with the Decision of the District of Columbia Circuit in *Asphalt Roofing Manufacturers Association v. I.C.C.*, 567 F.2d. 994 (D.C. Cir. 1977). Both Courts have reviewed precisely the same issue, raised by the same party in each instance, and have reached opposite conclusions. The District of Columbia Circuit, citing this Court's Opinion in *Arrow Transportation Co. v. Southern Ry.*, 372 U.S. 658 (1963), found that there is "no ground, on the basis of the Act, for treating [the power to investigate and the power to suspend] differently for purposes of review."

Further, certiorari is frequently granted to consider whether a lower court has misconceived the meaning or scope of a previous decision of this Court. *See, e.g., Federal Trade Commission v. Texaco, Inc.*, 393 U.S. 223, 225 (1968); *Wilkerson v. United States*, 365 U.S. 399 401 (1961); and, *Schlude v. Commissioner*, 372 U.S. 128, 130 (1963). In reaching its decision in this case, the lower court is in error in its ultimate conclusion because it incorrectly determined that the factual situations in *City of Chicago v. United States*, 396 U.S. 162 (1969) and in *Alton R.R. v. United States*, 287 U.S. 229 (1932) were comparable and that the findings in those cases applied to this case. The lower court, however, overelooked the critical distinction,

i.e., the absence in this case of an adjudication on the merits.

The considerations favoring the granting of certiorari strengthen when an important issue of statutory construction or application is at stake; *see e.g., Federal Communications Commission v. WOKO*, 329 U.S. 223, 226 (1946); or, where a decision of a Court of Appeals is inconsistent with decades of settled construction and practice by affected parties; *see Paterson v. Lamb*, 329 U.S. 539, 541 (1947); or, where a case involves principles "the settlement of which is of importance to the public. . ." *Layne and Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923), *United States v. United Mine Workers of America*, 330 U.S. 258, 269 (1947).

The question of statutory interpretation is fundamental to review, the Decision of the lower court could virtually destroy the ability of the Interstate Commerce Commission to act efficiently within the critical domain of its expertise, in its fundamental capacity as a rate regulating body, if its special discretionary powers at the suspension stage of rate publication are limited by the untimely and improper intervention of judicial review. Judicial review of agency action taken during the suspension stage freezes the administrative process of rate regulation literally *before* it has started. The lower court's decision is the first finding since the passage of the Mann-Elkins Act of 1910, 36 Stat. 539, 552, that a determination by the Commission not to investigate is reviewable.

The lower court's decision, if not reviewed and reversed, will, in essence, place the Interstate Commerce Commission in the same posture for all practical purposes that it suffered prior to 1910. If the lower court's determination, that a refusal to institute an investigation is a final decision on the

merits is upheld, the Commission would have to investigate every rate publication in order to guarantee that it would have an opportunity actually to fulfill its function as an administrative body with expertise in railroad rate-making matters.

Review by this Court is particularly appropriate in this case where the lower court has based its ultimate findings on misinterpretations of this Court's opinions, placed the Commission in a pre-1910 posture in relation to regulation of railroad rate-making and created uncertainty in the rate-making processes at a time when Congress has charged the Interstate Commerce Commission to "strive to attempt to achieve a better balance between the goals of protecting shippers and stable competition and the need to provide adequate revenues to the railroads in order that substantial public services are maintained."[5]

STATEMENT OF THE CASE

On August 14, 1977, the Southern Freight Association, representing railroads operating generally in the South and Southeast, (including all of the railroads represented in this petition) filed tariff schedules containing a 20 percent seasonal rate increase of limited duration pursuant to Section 15(17) of the Interstate Commerce Act.[6] This tariff, the subject of the lower court's decision, was to take effect on

5/ Senate Committee report on S. 2718 (the 4R Act), S. Rep. No. 199, 94th Cong., 1st Sess. 10-11 (1975).

6/ Section 15(17) was added by Section 202(d) of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4R Act"), Pub. L. No. 94-210. In Section 202(d), Congress specifically encouraged the establishment of seasonal rates. The Act further required the Commission to adopt expeditious procedures to establish railroad rates based on seasonal, regional or peak-period demand for rail services. These procedures were intended to provide incentive to shippers to reduce peak-period congestion and, equally important, to generate additional revenue for the railroads.

30 days' notice, as specifically set out in the Interstate Commerce Act[7] and was to remain in effect for 90 days, *i.e.*, from September 15 to December 15, 1977.

At the time the rates were filed, a Justification Statement, an elective not mandatory filing suggested by the Commission's regulations, was filed. In the Statement the Railroads proved that the three-month, peak-period movement did exist and was repetitive. Railroads also provided substantial information to indicate that peak-movement periods do result in severe strains on car supply and congest train movements into and out of yards resulting in costly inefficiency. Railroads also demonstrated that while their rates were regulated, their effective, non-regulated competitors — the exempt truckers and barge lines — were free to and did adjust their rates upward and downward consistent with volumes shipped.

Shippers were allowed, again by regulation, from August 15 to September 6, in which to file petitions for suspension and investigation. Approximately 35 such petitions were filed to which the Railroads replied on September 8.

On September 14, the entire Commission served its Decision declining to suspend the rates and directing the carriers to remove unlawfulness, if any, which might be brought to their attention involving any violations of Section 4 of the Interstate Commerce Act.[8]

Certain of the petitioners to the Commission sought and received from the lower court an ex parte temporary stay of the Commission's action on September 14, 1977. On the

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7/ Interstate Commerce Act, §6(3), 49 U.S.C. §6(3).

8/ 49 U.S.C. §4(1).

motion of the Interstate Commerce Commission, supported by Railroads, the lower Court received extensive oral argument on the propriety of continuing the Stay in effect; and, by Order entered September 22, 1977, the lower Court held that, although a strong showing had been made that it had jurisdiction to enter the Stay, a balancing of the equities under the traditional test of *Virginia Petroleum Jobbers Association v. F.P.C.*, 295 F.2d. 921 (D.C. Cir., 1951), required that the temporary stay be dissolved. The rates took effect at 12:01 A.M. on September 24, 1977.

On February 16, 1978, the lower Court issued its Decision finding that the Commission's refusal to investigate the rate increase was a final agency action subject to review. The case was remanded to the Commission with specific instructions on the manner in which a hearing should be conducted. A request for rehearing *en banc* was filed by the Interstate Commerce Commission. The Petition, however, was denied by Summary Order issued on May 12, 1978.

ARGUMENT

Has the Interstate Commerce Commission Adjudicated the Lawfulness of a Railroad-Initiated Rate When It Declines to Exercise Its Discretionary Powers Under Section 15(8) of the Interstate Commerce Act to Suspend and Investigate Tariff Publications?

The only "hearing" which was conducted by the Commission was, by definition, summary in nature. In *Luckenbach S.S. Co. v. U. S.*, 179 F.Supp. 605 (D. Dela. 1959) (three-judge court), *aff'd. in part, vacated in part*, 364 U.S. 280 (1960), the panel held that initial rate proceedings do not result in any determination on the lawfulness of rates. An action by the Commission under Section 15(8) is dis-

cretionary and interlocutory in nature and therefore not reviewable under the Administrative Procedure Act.[9] While judicial review is provided for in Chapter 7, Section 701(a) states plainly that: "[t]his chapter applies except to the extent that . . . (2) agency action is committed to agency discretion by law." While the District of Columbia Circuit did not include a discussion of the absence of a right to judicial review under the Administrative Procedure Act in *Asphalt Roofing*, it did discuss the matter with emphasis in *Action on Safety and Health v. F.T.C.*, 498 F.2d 757, 760-761 (D.C. Cir., 1974).

> "The statute and the cases make it clear that if an action is 'committed to agency discretion by law,' judicial review is not available . . . . If it has been so committed, Section 701(a)(2) of the A.P.A. must control and judicial review is precluded."

Section 15(8) vests in the Commission the sole and exclusive power to suspend or not to suspend the operation of new rates, and withdraws from the judiciary any pre-existing power to grant injunctive relief against the operation or non-operation of such rates. *Aberdeen and Rockfish R.R. v. SCRAP*, 422 U.S. 289, 45 L.Ed.2d. 191, 95 S.Ct. 2336 (1975); *United States v. SCRAP*, 412 U.S. 669, 37 L.Ed.2d. 254, 93 S.Ct. 2405 (1973); *Atchison, Topeka and Santa Fe Ry. v. Wichita Board of Trade*, 412 U.S. 800, 37 L.Ed.2d. 350, 93 S.Ct. 2367 (1973); and *Arrow Transportation Co. v. Southern Ry. Co.*, 372 U.S. 658, 10 L.Ed.2d. 52, 83 S.Ct. 984 (1963). In this case the Commission did not suspend the operation of rates. While under limited exceptions outlined in *Long Island R.R. Co. v. United States*, 193 F.Supp. 795, 800 (E.D. N.Y., 1961), a court may have jurisdiction to review an agency decision *to suspend* a rate, it is well

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9/ 5 U.S.C. §§702-706.

settled that the Commission's decision *not to suspend* is not reviewable. See, for example, *Port of New York Authority v. U.S.*, 451 F.2d 783 (2d Cir., 1971); *Delta Air Lines, Inc. v. C.A.B.*, 455 F.2d. 1340 (D.C. Cir. 1971); and, *Municipal Light Boards v. F.P.C.*, 450 F.2d. 1971).

In *Long Island* the Court observed at page 799 that:

> "The objection to judicial review of suspension orders even on the most limited basis stems [primarily from the fact] that the mere possibility of resort to the courts may seriously interfere with the administrative agency's effective performance of functions where speed is of the essence."

The suspension stage, which includes all actions which the Commission may take under Section 15(8), is a very fast-paced preliminary, or as the Commission has termed it, interlocutory, review of rate publications. Because of time limitations both protestants and respondents rely heavily on the Commission's expertise in the filing of what, of necessity, must be abbreviated statements of position. Since this is the only "record" upon which the Commission can make its determination on whether or not to use its Section 15(8) discretionary powers, the lower court's decision would mean that reviewing courts would consistently receive truncated records upon which they would be expected to review Commission action. The characteristics of the suspension stage foreclose the possibility of an adjudication on the lawfulness of a proposed rate. It is essential that this Court recognize that the limited record on which a decision is made to suspend or not to suspend is the same record on which a decision to investigate or not to investigate is made.

If the lower court's decision is allowed to stand, reviewing courts will be placed in the awkward position of inter-

jecting themselves into the administrative process to make initial determinations. It is *prima facie* true that initial determinations under the Interstate Commerce Act are outside the area of judicial competence. Courts are not qualified to fix rates or to determine what practices related to rates are to be preferred. In order to make a threshold determination on whether the Commission should have exercised its discretionary powers or not a Court would have to make an initial ruling on the merits of the case.

Can the Powers to Suspend and to Investigate Be "Separate and Distinct" for the Purpose of Judicial Review When Each Power, by the Terms of the Statute, is Wholly Dependent on the Other for Existence?

The lower court has taken the unusual step of breaking apart as "separate and distinct"[10] statutorily linked administrative powers each of which are wholly dependent upon the other. Without the power to suspend, the power to investigate under Section 15(8) would be a superfluous addition to the investigative power already available to the Commission under Section 13(1). Likewise, the power to suspend, except as an ancillary measure used in conjunction with an investigation, would give the Commission an unprecedented and extreme power to deny rate changes without making or intending to make a determination of lawfulness. These fundamental facts were recognized by Congress and resulted in the bifurcation of possible discretionary action, suspension/investigation, when the Commission's ability to suspend was extended in the Mann-Elkins Act.[11]

10/ Appendix B-7.

11/ Prior to the passage of this Act the Commission could suspend a rate only after it became effective.

The most exhaustive review of the legislative history and therefore the intent of Section 15(8)[12] is found in this Court's Decision in *Arrow*,[13] The reason for the extension of the Commission's suspension power from the post-effective stage of rate publication to the pre-effective stage was the disparity of treatment given by the district courts to cases coming before them concerning rates published but not yet effective. The Commission had recognized at least three years before the passage of the Mann-Elkins Act that different jurisdictions were reaching different conclusions and that the smaller shipper of modest means was actually being foreclosed from seeking relief. The result was discrimination against the majority of shippers before a rate matter even reached the Commission for review. Since the lower court's decision decision has the direct effect of creating a pre-Mann-Elkins Act situation, this Court can assume that the same problems that were encountered with premature court review before the Section 15(8) powers were available, will again be prevalent.

It is clear then why Congress felt it necessary to extend to the Commission the total discretion to suspend or not to suspend rates. The question of the addition of investigative powers had a practical foundation and was necessary to the fair treatment of railroads that would be subject to the absolute discretion which the Commission exercises. Without the addition of the investigative powers, coupled with a limitation on the length of time that a rate could be sus-

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12/ In the 4R Act, Section 15(7) is amended to exclude application to common carriers by rail. However, the suspension power is restated, although limited by new procedure requirements in Section 15(8) to apply solely to railroads. The suspension power remains exclusive, but is specifically limited to afford railroads a degree of deregulation.

13/ Cited *supra*, page 4.

14/ Administrative Procedure Act, 5 U.S.A. §706.

pended, the Commission would have been placed in the position of investigating most rates, if not all rates, before they went into effect. If an increase in rates is justified, but delayed for an extended length of time pending a determination on an issue of reasonableness, the railroad is deprived of revenue to which it is entitled.

Congress attempted to reach a solution that would be fair both to the public and to railroads. It is clear that great care was exercised to guarantee that the Commission would not be restrained in its use of exclusive power. Again referring to the decision in *Arrow*, at page 667, this Court said:

> "We cannot believe that Congress would have given such detailed consideration to the period of suspension unless it meant thereby to vest in the Commission sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief."

The basic purpose of Section 15(8) powers, whether they are exercised or not, is to prevent the courts, through premature and uneven adjudication, from entangling themselves in disagreements over the technicalities of rate publication, and also to protect the Commission from judicial interference until a final administrative decision on the lawfulness of a publication has been made.

The lower court has taken the paradoxical attitude that a final determination on the lawfulness of the rates was made when the Commission determined not to investigate, and that therefore, a final decision suitable for review had been made. However, it has remanded the case to the Commission for review to determine if the rates are just and reasonable and otherwise lawful. If a *final* decision has already

been made, why must another *final* decision be made?

By remanding under these circumstances, the lower court has gone beyond the scope of judicial review allowed by the Administrative Procedure Act.[14] The Court has stepped into the position of the Commission and exercised Commission discretion to institute an investigation absent formal complaint.

Has a Protestant to a New Rate Publication Exhausted Its Administrative Remedies by the Filing of a Protest Under Section 15(8) of the Interstate Commerce Act Requesting Suspension and Investigation?

While this question may appear to be somewhat ludicrous on its face, it is precisely the kind of question that the lower court's decision forces practitioners before the Interstate Commerce Commission to ask. If the Commission is forced to expand the suspension stage of rate-making to the level of an adjudicatory proceeding, it would appear that a protestant to a rate increase would be forced to elect to challenge a rate prior to effectiveness or after effectiveness. Clearly, railroads would be deprived of procedural due process if they were forced to defend every major rate publication on two separate records.

Practically, the lower court's decision has the effect of eliminating the unique suspension stage of railroad rate-making. The decision says very simply that the Commission must always investigate a rate publication if it is protested. That would be the only safe action that the Commissioned could take to protect its jurisdiction.

Practically speaking, it would not be feasible for appel-

14/ 5 U.S.C. §706.

late courts to review every decision made by the Commission not to investigate a proposed rate. *Kletschka v. Driver,* 411 F.2d. 436 (2d. Cir., 1969). There are two good reasons why this is true. First, the volume is simply overwhelming. The Southern Freight Tariff Bureau alone averages approximately 5,000 publications per year; and the Commission deals with eight other major railroad tariff bureaus in addition to individual railroad publications that are not made through tariff publishing agents. Second, the record available for a court actually to view would be so limited there would be nothing on which to base determinations about the nature of the decision made.

CONCLUSION

The conflict between the Decision of the Court of Appeals for the Eighth Circuit and the District of Columbia Circuit in *Asphalt Roofing* is sufficient to justify the grant of certiorari to review the judgment below. However, Railroads have presented substantially more than a showing of conflict between Decisions and suggest that denial of the several petitions for the issuance of a Writ of Certiorari to review the Decision in *Seaboard Allied Milling Corp., et al. v. U. S.,* 570 F.2d 1349 (1978) would result in utter chaos in Commission monitoring of railroad rate publications.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1729

Seaboard Allied Milling Corp.,
Archer Daniels Midland Company,
ADM Milling Co., Conagra, Inc.,
and Dixie Portland Flour Mills,
Inc.,

Petitioners,

v.

Interstate Commerce Commission
and United States of America,

Respondents.

PETITION FOR REVIEW OF AN ORDER OF THE INTERSTATE COMMERCE COMMISSION.

Filed: September 22, 1977

Before MATTHES, Senior Circuit Judge, WEBSTER and HENLEY, Circuit Judges.

ORDER

On September 14, 1977 petitioners filed a petition for review of the Order of the Interstate Commerce Commis-

sion entered on September 14, 1977, in Suspension and Fourth Section Board Case No. 67123, and Office of Proceedings Docket No. 36663. Petitioners simultaneously filed a motion for stay or other injunctive relief with respect to said order. On September 14 we granted a temporary stay and granted respondents until September 21, 1977 to respond.

In the interim several motions have been filed on behalf of various interested parties for leave to intervene. All pending motions to intervene are hereby granted.

In the order of the Interstate Commerce Commission sought to be reviewed, the Commission refused to suspend the September 15, 1977 effective date of proposed rate tariffs published by the Southern Freight Association increasing freight rates on railroad owned cars approximately 20% from September 15, 1977 to December 15, 1977. These so-called demand-sensitive rates were based on §202(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. §15(17). In opposing the tariffs and in support of suspension thereof by the Commission, petitioners asserted, *inter alia*, that the new rates violated the longhaul-shorthaul provisions of 49 U.S.C. §4(1), as well as §§1(5), 1(6), 1(11) to 3(1) and 15(17) of the Interstate Commerce Act. These contentions were rejected by the Commission.

Respondents contend that this Court is without jurisdiction to grant the stay, relying primarily upon *Arrow Transportation Co. v. Southern Ry.*, 372 U.S. 658 (1963). Petitioners contend that the patent illegality of the tariffs brings this case within an exception to *Arrow Transportation Co. v. Southern Ry., supra*, at 671, n.22 and that the stay is necessary to protect them from irreparable in-

jury pending this Court's review of the merits.

We have reviewed the briefs and papers on file and have heard extensive oral argument by the parties and intervenors this date. Considering the circumstances by which this case comes to us, it appears to be *sui generis.* Petitioners have made a strong showing that this Court has jurisdiction to enter the stay. After balancing the equities under the traditional tests of *Virginia Petroleum Jobbers Assn v. F.P.C.*, 295 F.2d 921 (D.C. Cir. 1958), however, we are satisfied that the temporary stay heretofore granted should be and it is hereby dissolved.

Pending our determination of the merits of the petition for review, intervenor railroads are admonished to maintain such records as will be consistent with the accounting procedures established under 49 U.S.C. §15, par. (8) (c) to enable prompt determination of overcharges should the contentions of petitioners prevail upon review.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1729

Seaboard Allied Milling
Corp., et al.,

Petitioners,

v.

Interstate Commerce
Commission, et al.,

Respondents.

On Petitions for Review of Orders of
Interstate Commerce Commission.

No. 77-1770

Board of Trade of the City
of Chicago, et al.,

Petitioners,

v.

Interstate Commerce
Commission, et al.,

Respondents.

Submitted: January 13, 1978

Filed: February 16, 1978

Before GIBSON, Chief Judge, VAN OOSTERHOUT and MATTHES, Senior Circuit Judges.

VAN OOSTERHOUT, Senior Circuit Judge.

These are consolidated actions brought to set aside the Interstate Commerce Commission's orders in Docket 36663, Demand-Sensitive Rates in Grain and Soybeans - Southern Freight Association Territory (SFA). The Commission in its orders refused to suspend and to investigate the railroads' proposed tariff providing a 20% increase in rail rates applicable from September 15 through December 15, 1977, on 29 grain products shipped to and within SFA territory and to stations in SFA territory from limited points in Illinois and Indiana. The rate increase applied only to carriage in railroad owned cars, not to carriage in privately owned cars. The increase was sought pursuant to § 202(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law 94-210, 49 U.S.C. § 15(17).[1]

---

[1]Such Act provides:

Within one year after February 5, 1976, the Commission shall establish, by rule, standards and expeditious procedures for the establishment of railroad rates based on seasonal, regional, or peak-period demand for rail services. Such standards and procedures shall be designed to (a) provide sufficient incentive to shippers to reduce peak-period shipments, through rescheduling and advance planning; (b) generate additional revenues for the railroads; and (c) improve (i) the utilization of the national supply of freight cars, (ii) the movement of goods by rail, (iii) levels of employment by railroads, and (iv) the financial stability of markets served by railroads. Following the establishment of such standards and procedures, the Commission shall prepare and submit to the Congress annual reports on the implementation of such rates, including recommendations with respect to the need, if any, for additional legislation to facilitate the establishment of such demand-sensitive rates.

The proposed tariff was published and filed with the Interstate Commerce Commission on August 18, 1977, by the SFA authorized agent for the interested railroads and was to become effective on September 15, 1977. Protests were filed with the Interstate Commerce Commission by some 35 separate entities or organizations representing major elements of the agricultural community including many large-scale poultry producers who used considerable quantities of transported grain. Most of them are plaintiffs or intervenors in these consolidated actions.

The issues here raised were raised before the Commission. The affected railroads responded to such protests. Included were the contentions that the Commission should suspend the tariff and investigate the charges that the tariff violated the long-and-short haul provisions of 49 U.S.C. § 4(1), that applying the increase only to railroad-owned cars was discriminatory, and that the increase did not serve the purpose of § 15(17) and the regulations promulgated thereunder, published in 49 C.F.R. §§ 1109.10 *et seq.*

On September 14, 1977, Division Two of the Commission, consisting of three members, filed a summary order reciting that 49 U.S.C. §§ 1, 2, 3, 4, and 15(c) violations had been charged but not established and denied petition for review of the tariff. On the same date the entire Commission in an order states:

> Several protestants also claim that the proposal would result in unauthorized departures from the long-and-short haul clause of Section Four of the Act. They offer rate examples purporting to demonstrate these departures. In rebuttal, respondent presents argument and tariff citations to disprove protestants' claims. In addition, respondent states

that it intends to avoid any potential Section Four violations and it commits itself to making tariff changes to remove any of these called to its attention. The evidence offered to support the alleged violations of Section Four of the Act does not warrant suspension of this proposal. However, respondents are admonished to take prompt action to remove violations of the long-and-short haul provision of Section 4(1) of the Act, if any, in connection with inter-territorial and intra-territorial movements that may be caused by application of demand-sensitive rates on whole grains between points in southern territory.

* * *

The section 2 and 3(1) issues are based on the applicability of the proposal, notably the exclusion of movements in private cars. The Commission has long recognized the justification for disparate treatment of private equipment. See, for example, *Switching at St. Louis and East St. Louis*, 120 I.C.C. 216, 221 (1926).

Other section 2 and 3(1) matters are the result of the possibly overbroad scope of the proposal. However, insufficient evidence is available to warrant suspension on the basis of such assertions. The adverse effects predicted by protestants and the benefits advanced by SFA are speculative. This is an experimental rate increase and there is no way to predict with certainty the overall impact of the proposal.

* * *

This is the first proposal filed pursuant to Ex Parte No. 324 regulations. The complaint sections of the Act protect, to a certain extent, the interests of those who may be adversely affected. Weigh-

> ing the contentions before us and the clear Congressional purpose to permit experimental ratemaking, we will permit this temporary adjustment to become effective.
>
> *It is ordered,* that the respondent carriers file, with the Secretary of this Commission, reports relating the effect of the schedules in terms of (1) car utilization (filled and unfilled orders by car types); (2) grain movements based on specific commodities and the stations of origin and destination; (3) carloadings by car type and commodity; (4) evidence of diversion; and (5) evidence of shipper rescheduling. * * * This requirement is subject to later refinement or modification by the Commission. Since several protestants raise allegations concerning an alleged disparate treatment between railroad-owned and privately owned equipment, we will, out of caution, direct our Bureau of Investigations and Enforcement and Bureau of Operations to closely monitor this matter.

Seaboard Allied Milling Corporation, *et al.*, on petition to this court on September 14 obtained ex parte temporary stay of the Commission's orders refusing to suspend the operation of the tariff and permitting it to become effective. Another panel of this court, after a hearing on briefs and oral argument, set aside the stay order. A copy of such order not heretofore published is attached hereto as Appendix A.

Thereafter the Commission by order dated September 23, 1977, permitted the carriers to implement its proposed tariff on one day's notice. Such notice was given and the tariff was placed in effect. This court in its order of September 22 states petitioners made a strong showing that this court has jurisdiction to grant the stay but that upon a balancing of equities the temporary stay should be dis-

solved. The order however provides:

> Pending our determination of the merits of the petition for review, intervenor railroads are admonished to maintain such records as will be consistent with the accounting procedures established under 49 U.S.C. §15, par. (8)(e) to enable prompt determination of overcharges should the contentions of petitioners prevail upon review.

The Commission's order of September 23 contains substantially the same provision. Such directions were authorized by § 15(8)(e) and by general equitable principles. Such provisions at least strongly tend to indicate that uncertainty in the lawfulness of the proposed tariff exists.

Petitioners claim the Commission erred in not suspending the operation of the proposed tariff on the basis that it was patently in violation of statutory law. The United States, the Interstate Commerce Commission and the railroads all contend that the Commission has a large degree of discretion in suspension matters and that its action in refusing to suspend the operation of the tariff is not subject to judicial review. Respectful authority supports this contention. *United States v. SCRAP*, 412 U.S. 669, 698 (1973); *Arrow Transportation Co. v. Southern Railway Co.*, 372 U.S. 658, 667-68 (1963). In any event, the period covered by the seasonal tariff has long since expired and the resolution of the jurisdiction to review the suspension order has no significant impact on the result of this case. The protective orders of this court and the Commission protect the rights of the petitioners in event the court finds it has a right to review the Commission's refusal to continue the investigation of the validity of the proposed tariff and finds it to be unlawful.

The critical issue in this case is whether jurisdiction exists to review the propriety of the Commission's termination of its investigation of the lawfulness of the proposed tariff. The United States and the petitioners vigorously assert jurisdiction exists. They contend that the proposed seasonal rate violates the long-and-short haul rate differential set forth in 49 U.S.C. § 4(1). Such section prohibits common carriers from receiving any greater compensation for transportation for a shorter haul than for a long distance haul over the same line or route in the same direction, or to charge greater compensation as a through rate than the aggregate of the intermediate rates. The statute also provides that the carrier upon application and investigation by the Commission in special cases may be authorized by the Commission to charge less for longer than for shorter distances. No application under the foregoing provision has been made, investigated or considered by the Commission.

The Commission in its order above quoted acknowledges that the protestants have cited instances in support of their contention that the proposed tariff violates § 4(1). Protestants also urge that if more time were available additional violations could be found. Violation of the long-and-short haul provisions are denied by the railroads upon whom the burden rests to support the lawfulness of the tariff. The Commission in its order summarily holds that the evidence does not support § 4 violations to a sufficient extent to warrant suspension of the tariff and finds it unnecessary to further investigate the asserted violations. The Commission goes on to say: "However, respondents are admonished to take prompt action to remove violations of the long-and-short haul provision of Section 4(1) of the Act, if any. . . ." Reliance is also placed on the railroads' promise to avoid § 4 violations. This

may be difficult to do with the approved tariff requiring payment of charges in accordance with the tariff provisions approved by the Commission. As heretofore stated, we are not reviewing the Commission's discretion to suspend the tariff.

We accept the view of the United States and the protestants that the suspension powers and investigation powers are separate and distinct. The Commission has statutory authority to investigate the lawfulness of its tariffs. It is not contended that § 15(17) modifies or repeals the requirements of § 4(1). In any event, we hold that it does not.

The factors which prompted the Supreme Court in *Arrow Transportation Co. v. Southern Railway Co., supra,* to hold suspension orders not reviewable are not applicable to decisions of the Commission to refuse to make or to terminate an investigation of the lawfulness of a proposed tariff. The United States in support of its view at pp. 15 and 16 of its brief states:

> In contrast to the suspension power, Congress granted the Commission the power to investigate *proposed* rates because it viewed the power to investigate only *existing* rates as an inadequate remedy for the protection of shippers and the public. It authorized the Commission to order an investigation into proposed rates upon complaint by an interested party or upon its own initiative. *See* 49 U.S.C: 15 (8)(a). The Commission's authority to investigate proposed rates before their effective dates was consciously made coextensive with its prior-existing power to investigate existing rates which were the subject of section 13(1) complaints. [I Sharfman, *The Interstate Commerce Commission* at 58 (1931)]. The Congressional purpose underlying sections 13(1) and 15(8) is the same, insofar as both authorize the

> Commission to investigate and make orders with respect to the legality of rates, differing only as to when the Commission commences its investigation. For purposes of judicial review, it is unreasonable to assume that Congress intended the Commission's power to investigate proposed rates to be a matter committed to the sole discretion of the agency. See S.Rep. No. 355, [61st Cong., 2d Sess.], at pages 8-9.

We note that the Supreme Court has not passed on the reviewability of the issues before us. *Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289, 317-18 (1975).

A finding that the court has jurisdiction to review the Commission's determination not to pursue its investigation is consistent with finding that the review of a similar action by the Commission is available. *Alton Railroad Co. v. United States*, 287 U.S. 229, 236-37 (1932). Likewise, the Commission's decision to terminate investigation commenced pursuant to § 13a(1), involving the discontinuance of service by a carrier, has been held to be reviewable. *City of Chicago v. United States*, 396 U.S. 162 (1969). In footnote 5 of that case at p. 166 the court states:

> The Administrative Procedure Act, 5 U.S.C. § 551(6) (1964 ed., Supp.IV), defines "order" as including a "negative" form of "a final disposition" by agency action. And that kind of "order" is subject to judicial review. 5 U.S.C. §§ 551(13), 701 (b)(2), 702 (1964 ed., Supp.IV).
>
> When carriers file new rates, the Commission has authority on its own initiative or on complaint to make an investigation either with or without suspension of the new rates. 49 U.S.C. § 15(7). Where the Commission finds the proposed rates lawful, its order reads: "[T]he investigation proceedings [are] discontinued." See *Eastern Central Motor Carriers*

Assn. v. Baltimore & O.R. Co., 314 I.C.C. 5, 51. Such orders are reviewable. *Cooper-Jarrett, Inc. v. United States*, 226 F.Supp. 318, aff'd, 379 U.S. 6.

We recognize the right of review in rate cases is a narrow one. *See Atchison, Topeka & Santa Fe R. Co. v. Wichita Board of Trade*, 412 U.S. 800, 806-07 (1973) (plurality opinion); *North Dakota State Wheat Commission v. United States*, 565 F.2d 621 (8th Cir. 1977). The Commission's expertise in the field must be given considerable respect. The unlimited discretion would appear to have more weight in resolving economic issues. Significant policy reasons exist for review of the lawfulness of the proposed rate under the facts of this case. If the Commission's decision not to pursue an investigation of the factual background relevant to the legality issue is unreviewable, the protestants only resort would be to file a § 13(1) complaint once the rates became effective. The Commission has apparently limited its authority in such cases to the issue of whether the rate as applied is discriminatorily prejudicial or illegal. Moreover, in § 13(1) proceedings the burden is on the party challenging the lawfulness of the rate. In a § 15(8) proceeding the burden is on the railroad to establish the lawfulness and the reasonableness of the tariff.

It is the duty of the Commission in rate proceedings to investigate substantial issues relating to the lawfulness of the proposed tariff. While no formal hearing on the lawfulness issue was ordered by the Commission, the protestants' basis for declaring the tariff violated applicable statutes was clearly raised before the Commission. The Commission's order refusing to pursue the investigation reflects that it recognized and considered the protestants' claims. We believe that the Commission was derelict in its re-

sponsibility in refusing to pursue the investigation of the substantial charges of illegality which were made. Its order in effect made the proposed tariff operative and placed it in effect. Its order reflects no supporting findings or a reasonable basis for so doing, at least with respect to the charged § 4 (1) violations. Its order in effect is a final order on the § 4 (1) issue.

The Commission and the railroads urge that *Asphalt Roofing Manufacturers Association v. Interstate Commerce Commission,* ____ F.2d ____ (D.C. Cir. Oct. 17, 1977) Nos. 75-1641 *et al.*), supports their position that the Commission's termination of its investigation is not a reviewable order.

We agree with the statement in that opinion reading:

> The Supreme Court in *Aberdeen & Rockfish R.R. v. SCRAP,* 422 U.S. 289, 314-18 (1975) (SCARP II) . . . expressly declined to resolve the issue whether an ICC "decision that a *general* rate increase is justified by reason of revenue need is a final decision ripe for immediate review. . . . absent exhaustion of § 13 remedies. . . ." 422 U.S. at 217-18 n.18 (emphasis by the Court). The Court in *(SCRAP II did, however,* hold that the Commission's conclusion at the close of a general revenue proceeding "that it need give no further *consideration* to environmental factors "under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-35 (1970), *in that proceeding"* was a final decision subject to judicial review, 422 U.S. at 318-19 (emphasis by the Court.)

Id. at ____ (slip op. at 11-12). We disagree with the conclusion that the Commission decisions not to pursue an in-

vestigation are under all circumstances not final decisions subject to judicial review and with the reasoning upon which such conclusion is based. *Id.* at ____ (slip op. at 12).

The substantial violations of specific statutory requirements here alleged, apart from the economic issues, are matters that should be fully investigated and decided with appropriate findings and conclusions. Failing so to do places the proposed tariffs in effect and is equivalent to a finding of lawfulness of the tariffs.

There is as great a justification for treating the Commission's order terminating the investigation as a final order subject to judicial review as there is for the holding in *Aberdeen & Rockfish R.Co. v. SCRAP, supra* at 318-19, that the Commission's determination in the general revenue proceeding to give no further consideration to environmental factors in that proceeding is a final order subject to judicial review. As stated by the Court: "[W]hatever consideration of environmental matters is necessary or proper at the general revenue proceeding is over and done with when that proceeding terminates." A similar reasoning should apply when substantial charges of patent illegality in the tariffs are made.

We believe that the purposes of judicial and administrative efficiency will be best served by permitting review of the termination by the Commission of its investigation. Such procedure would eliminate the necessity of consideration of numerous potential § 13(1) complaints by the Commission and the court. As above noted, the burden in a § 13(1) proceeding would be on the complainants to show that the tariff was unlawful and that they were adversely affected by it.

The Commission in its brief, at pp. 11 and 12, states: "While it may be true that patently illegal tariff proposals may be rejected, we strongly assert that this is not the posture in the present case." We believe a substantial issue of patent illegality has been presented. The validity of such complaint was not determined by an adequate investigation. We express no view on whether the proposed tariff violates the short-and-long haul provision of § 4(1) but do hold that charge has sufficient substance to require the Commission to investigate charges of such violation and to make appropriate findings and conclusions on the basis of such an investigation.

What has heretofore been said is sufficient in itself to require a vacation of the Commission's premature termination of its investigation of the § 4(1) charge and a remand of such issue to the Commission for an adequate investigation and findings based upon the investigation. A remand of such issue to the Commission for an adequate investigation and findings based thereon should be made.

We also have considerable doubt of the investigation with respect to the rate discrimination charges arising from the exemption of cars not owned by the railroads. Compensation for use of nonowned cars is prescribed by tariffs and the probability exists that the tariff compensation for the use of non-railroad cars has been paid. Thus a serious question arises whether illegal preference is given owners or lessees of privately owned cars to the detriment of shippers using railroad owned cars and whether by reason thereof producers and purchasers of grains shipped in railroad cars have been prejudiced by such an arrangement.

We hold that under the peculiar circumstances of this case charging patent illegality of the proposed tariff that

the Commission's determination not to adequately investigate the charges should be vacated. This case is remanded to the Commission with directions to investigate the charges of patent illegality and to make findings and determinations based upon such investigation.

The Commission is directed to promptly hold hearings to investigate the charges of patent illegality and to make detailed findings and conclusions with respect thereto.

If the Commission after investigation determines that the tariff is unlawful, it shall make appropriate provision for refund of increased charges collected under the tariff.

The Commission's order terminating its investigation of patent illegality charges is vacated and these cases are remanded to the Commission for further proceedings consistent with the views expressed in this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

SERVICE DATE
SEP 14 1977

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 14th day of September, 1977.

No. 36663[1]

DEMAND SENSITIVE RATES ON GRAIN AND SOYBEANS - SOUTHERN FREIGHT ASSOCIATION TERRITORY

This order concerns the following rate tariff schedules:

SOUTHERN FREIGHT ASSOCIATION, AGENT:

Supplement 23 to Tariff 972-F, I.C.C. S-1359
(Incentive Grain Tariff)
Supplement 201 to Tariff 988-A, I.C.C. S-909
(Southern Export Grain Tariff)
Supplement 137 to Tariff 908-B, I.C.C. S-999
(Southern Grain Tariff)
and any other related supplements.

Generally, these proposals involve a 20 percent increase on grain movements in railroad-owned cars between September 15 and December 15, 1977, inclusive. The proposals apply to barley, buckwheat, corn, corn screenings,

1/ Suspension No. 67123

grain sorghums, oats, rye, wheat, and soybeans from, to and between points in the Southern Territory, and Indiana and Illinois. See Appendix A for a listing of the STCC numbers.

The schedules were published by Southern Freight Association (SFA) pursuant to the regulations (49 CFR § 1109.10, as amended) established by the Commission in Ex Parte No. 324, *Standards and Expeditious Procedures for Establishing Railroad Rates Based on Seasonal, Regional, or Peak-Period Demand for Rail Service,* _____ I.C.C. _____ decided January 28, 1977.

Although optional under the regulations a justification statement accompanied the tariff publication. Little cost evidence, also optional under the regulations, was offered. However, SFA did indicate that an incentive was necessary to help level-out the demand for rail cars during the peak season but that lower off-peak rates were not feasible since grain rates are generally depressed in the south.

More than 20 parties protested the proposal and assailed the justification statement. The principal objections were (1) the proposal is unreasonable and excessive and in violation of section 1(5) of the Interstate Commerce Act (the Act); (2) the proposal results in unjust discrimination, undue preference and prejudice in violation of sections 2 and 3 (1) of the Act; (3) the proposal does not meet the goals set out in Ex Parte No. 324. SFA replied to these protests.

Several protestants also claim that the proposal would result in unauthorized departures from the long-and-short haul clause of Section Four of the Act. They offer rate examples purporting to demonstrate these departures. In rebuttal, respondent presents argument and tariff citations to

disprove protestants' claims. In addition, respondent states that it intends to avoid any potentional Section Four violations and it commits itself to making tariff changes to remove any of these called to its attention. The evidence offered to support the alleged violations of Section Four of the Act does not warrant suspension of this proposal. However, respondents are admonished to take prompt action to remove violations of the long-and-short haul provision of Section 4(1) of the Act, if any, in connection with inter-territorial and intra-territorial movements that may be caused by application of demand-sensitive rates on whole grains between points in southern territory.

Section 15(8)(d)(ii) of the Act conditions the Commission's power to suspend in excess of a just and reasonable maximum on a finding of market dominance. Some protestants offered evidence of market dominance in certain situations. However, there has been no attempt to demonstrate the existence of market dominance throughout the entire affected area. to the extent that market dominance may exist, we nevertheless decline to exercise our authority to suspend this experimental rate proposal, which appears to be in general conformity with the goals of the Railroad revitalization and Regulatory Reform Act of 1976 (4-R Act), because we are not convinced that protestants have sustained their burden on the section 1(5) assertions.

The section 2 and 3(1) issues are based on the applicability of the proposal, notably the exclusion of movements in private cars. The Commission has long recognized the justification for disparate treatment of private equipment. See, for example, *Switching at St. Louis and East St. Louis*, 120 I.C.C. 216,221 (1926).

Other section 2 and 3(1) matters are the result of the

possibly overbroad scope of the proposal. However, insufficient evidence is available to warrant suspension on the basis of such assertions. The adverse effects predicted by protestants and the benefits advanced by SFA are speculative. This is an experimental rate increase and there is no way to predict with certainty the overall impact of the proposal.

We will order the respondent carriers to make weekly reports to this Commission demonstrating the effect of the schedules. This should not prove burdensome to the carriers since they already provide a large portion of the information to the Association of American Railroads. We stress that this action should not be viewed as a measure that will be used in future Ex Parte No. 324 filings. It is only being used here because of the unique circumstances and the broad application of the schedules.

The Commission was directed to establish a regulatory climate conducive to rate innovation and experimentation by the Congress in the 4-R Act. Ex Parte 324 was a direct result of that directive.

This was the first proposal filed pursuant to Ex Parte No. 324 regulations. The complaint sections of the Act protest, to a certain extent, the interests of those who may be adversely affected. Weighing the contentions before us and the clear Congressional purpose to permit experimental ratemaking, we will permit this temporary adjustment to become effective.

It is ordered, that the respondent carriers file, with the Secretary of this Commission, reports relating the effect of the schedules in terms of (1) car utilization (filled and unfilled orders by car types); (2) grain movements based on

specific commodities and the stations or origin and destination; (3) carloadings by car type and commodity; and (5) evidence of shipper rescheduling. Each weekly report shall be filed no later than two weeks after the end of the report week. A week, for the purpose of this proceeding, shall run from Thursday to Wednesday, inclusive. This requirement is subject to later refinement or modification by this Commission. Since several protestants raise allegations concerning an alleged disparate treatment between railroad-owned and privately-owned equipment, we will, out of caution, direct our Bureau of Investigations and Enforcement and Bureau of Operations to closely monitor this matter.

By the Commission. (Vice Chairman Clapp and Commissioner Christian did not participate.)

H. G. HOMME, JR.
Acting Secretary

(SEAL)

APPENDIX A

STCC NO.	COMMODITY DESCRIPTION
0113110	Barley
0113210	Corn (not popcorn), in the ear, dried inc. not shelled
0113215	Corn (not popcorn), shelled, dried
0113310	Oats
0113410	Rice, rough
0113510	Rye
0113615	Darso grain
0113620	Durra
0113625	Feterita grain
0113630	Grohoma grain
0113635	Hegari (higera) grain
0113640	Kafir (kaffri) (kafir (kaffir) corn)
0113645	Kaoliang grain
0113650	Kalo grain
0113655	Milo (milo maize)
0113660	Shallu grain
0113665	Shrock grain
0113670	Egyptian wheat
0113690	Sorghum grain, nec. aao. sorghum grains, in mixtires
0113710	Wheat
0113720	Wheat, durum, amber or red
0113910	Buckwheat
0113915	Spelt
0113920	Emmer
0113925	Millet
0113930	Grain screenings, unground
0113990	Grain, nec
0114410	Soybeans, dried
0114415	Soybeans, fresh

APPENDIX D

SERVICE DATE
SEP 14 1977

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D.C. on the 14th day of September, 1977.

No. 36663

REJECTION OF TARIFF MATTER-DEMAND SENSITIVE RATES ON GRAIN
SOUTHERN FREIGHT ASSOCIATION, AGENT

It appearing, That Southern Freight Association, Agent, has filed conversion table supplements to each of three tariffs for the purpose of increasing by 20% rates and charges on grain and related products to become effective September 15, 1977 to apply during the peak period for the movement of grain;

It further appearing, That Archer Daniels Midland Company; Conagra, Inc.; Dixie Portland Flour Mills, Inc.; Seaboard Allied Milling Corp., and ADM Milling Co., have filed a petition, as supplemented, for rejection of the said supplements alleging that the said supplements violate Section 4 of the Interstate Commerce Act; that the publications also violate Sections 1, 2, 3 and 15(7) of the Act as described in a verified complaint filed contemporaneously with the petition.

It further appearing, That no valid reason exists for the

rejection of the tariff publication matter; and good cause appearing therefore:

It is ordered, That the petition for rejection be, and it is hereby, denied.

This is not a major Federal action significantly affecting the quality of the human environment with the meaning of the National Environmental Policy Act of 1969.

By the Commission, Division 2, Commissioners Murphy, Gresham and Clapp (Commissioner Clapp did not participate)

H. G. Homme, Jr.
Acting Secretary

(SEAL)

APPENDIX E

SERVICE DATE
OCT 17 1977

ORDER

INTERSTATE COMMERCE COMMISSION

No. 36663[1]

DEMAND SENSITIVE RATES ON GRAIN AND SOYBEANS-SOUTHERN FREIGHT ASSOCIATION TERRITORY

On September 14, 1977 the Commission served an Order in the above captioned docket requiring, *inter alia,* that the carriers file weekly reports so that the Commission could monitor the impact of the seasonal rates. In a letter dated October 11, 1977, Seaboard Coast Line Railroad Company (SEA)[2] has suggested certain modifications in these reporting requirements.

None of the suggested changes will materially affect either the content or the value of the reports. SCL has noted that the rates actually became effective on Saturday, September 24, rather than the published effective date of Thursday, September 15. Thus, it requests that the reporting week be changed from a Thursday to Wednesday basis to a Saturday to Friday basis. We see no reason to deny such a request.

The SFA carriers have also requested that the first report

should be due no earlier than October 21, 1977. In view of the fact that the compilation of the requested data will require substantial time and effort and will probably not be available immediately at the close of the reported week, the request is reasonable.

One final refinement suggested by the carriers concerns the duplication of reports which will occur since we have required that both the origin and destination points be reported. Only in the instances where shipments move on combination or joint rates would such dual reporting occur. We will modify the requirements so that only the originating carriers will have the duty to report the origin and final destination of each shipment.

It is ordered, that the following procedural changes be made in connection with the weekly reporting requirements prescribed in the order of September 14, 1977:

1. A week for purposes of reporting shall run from Saturday to Friday.

2. The initial report is due no later than October 21, 1977.

3. The origin carriers shall report grain movements based on specific commodities and the stations or origin and destination.

---

[1]Suspension Docket No. 67123

[2]On behalf of all Southern freight Association carriers.

Decided October 14, 1977.

By the Commission, Commissioner Murphy.

H. G. HOMME, Jr.
Acting Secretary

(SEAL)

APPENDIX F

Interstate Commerce Act, Section 4, 49 U.S.C. §4(1):

> (1) it shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance:

Section 701, Administrative Procedure Act, 5 U.S.C.A. §701(a)

> (a) This chapter applies, according to the provisions thereof, except to the extent that —
>
> (1) Statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1977

Nos. 77-1729 and 77-1770

SEABOARD ALLIED MILLING CORP.
et al., and BOARD OF TRADE OF
THE CITY OF CHICAGO et al.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION
ET AL.,

Respondents,

and

SEABOARD COAST LINE RAILROAD
COMPANY, ET AL.,

Intervenor-Respondents.

Petition for review of Order of
Interstate Commerce Commission

The Court having considered petition for rehearing en banc filed by counsel for respondent, Interstate Commerce Commission, and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

May 12, 1978.

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DEC - 9 '78

No. 78-604

Supreme Court, U. S.
FILED
DEC 9 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

SEABOARD COAST LINE RAILROAD COMPANY, ET AL.,

PETITIONERS,

v.

SEABOARD ALLIED MILLING CORP., ET AL.,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY

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No. 78-604

In the Supreme Court of the United States

OCTOBER TERM, 1978

SEABOARD COAST LINE RAILROAD COMPANY, ET AL.,

PETITIONERS,

v.

SEABOARD ALLIED MILLING CORP., ET AL.,

RESPONDENTS.

On Petitions for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

REPLY OF PETITIONER SEABOARD COAST LINE RAILROAD COMPANY, ET AL., TO BRIEF FOR SEABOARD ALLIED MILLING CORP., ET AL., IN OPPOSITION

This is a reply by Seaboard Coast Line Railroad Company, Louisville and Nashville Railroad Company, Illinois Central Gulf Railroad Company and St. Louis-San Francisco Railway Company specifically to the arguments in opposition to the issuance of a Writ of Certiorari in the joint filing made to this Court by Seaboard Allied Milling Corp., Archer Daniels Midland Company, ADM Milling Co., Conagra, Inc., Dixie-Portland Flour Mills, Inc., Southeastern Poultry and Egg Association and States of North Carolina and Indiana.

Section 4(1) Violations Were an Afterthought Issue Raised Before the Commission in Skeleton Form Which Has Been Magnified Beyond Reasonable Proportions

The question of whether or not the Interstate Commerce Commission ("the Commission") allowed a publication to go into effect which violated Section 4(1) of the Interstate Commerce Act ("Act") is an issue, *an afterthought issue*, which has been developed and unreasonably played upon by the Protestants before the lower Court and now before this Court. The tariff-filing railroads never requested and were never granted any relief to depart from the requirements of Section 4(1) of the Interstate Commerce Act.[1] The Protestants to the increase, during the suspension stage, did not pursue the issue in their protest.[2] The issue was raised and argued in a separate filing entitled "Petition for Rejection of Tariff Publication" which requested not that the Commission investigate to determine whether or not there were any violations but that the Commission take the drastic step of actually rejecting the filing of the tariff without investigation.[3]

1/ The text of 49 U.S.C. §4(1), recodified at 49 U.S.C. §10726 is found at page F-1, Seaboard Coast Line Railroad Company, et al., Petition for Issuance of a Writ of Certiorari to the Eighth Circuit.

2/ The initial petition to reject was filed by September 6, 1977, the deadline date for protest. However, the Protestants had misinterpreted the tariff and the violations alleged were disproved, through verified reply, by the railroads.

3/ Rejection of a tariff is normally an informal matter which simply allows a filing party to correct an error before consideration by an administrative body. *Municipal Light Boards v. F.P.C.*, 450 F.2d. 1341 (D.C. Cir. 1971). In this case, the Protestants were requesting that the rate publication, in essence, be permanently rejected. The Court is reminded that this particular tariff publication was made to apply during a seasonal movement of grain. Delay awaiting republication could have completely destroyed the purpose of the publication in the first place.

While the Protestants proclaim to the Court that there was compelling verified evidence before the Commission to support the claim of patent illegality under Section 4(1), the record shows that indeed the evidence which was presented to the Commission in verified protest filings covered various and sundry issues other than the possibility of illegality because of long-and-short haul violations. On the other hand, the Petition for Rejection, as supplemented, was a document prepared by Protestants' lawyers, unverified, which argued the legality of the continuation of a publication if such violations did exist. The legal arguments had attached to it an "exhibit" page which listed two "illustrative" violations. However, railroads were able to respond to the two routes listed by Protestants with a complete answer showing that the routes did not violate the provisions of Section 4(1). The supplementary information,[4] which was filed too late to allow railroads properly to research and respond,[5] contained an additional listing of point-to-point routes to which the rate applied, that were allegedly in violation of the Act.

The Commission does not have the authority under Section 15(8) to reject a tariff. As a matter of fact, the Mann-Elkins Act[6] specifically took into account the need to protect railroads from such arbitrary action. For this reason the Commission can only suspend for a period of seven months before making a decision. And the decision that is made after a rate is suspended must be made on the basis of an investigation, an investigation by the Commission's staff without hearing or an investigation within a formal hearing.

4/ The Supplementary Petition for Rejection was a desperate *late-filed* attempt to re-establish an issue which had been completely negated by railroads' reply.

5/ The Railroads did respond within twenty-four with only hours left for Commission consideration.

6/ See Seaboard Coast Line Railroad Company, et al., Petition, pp. 6, 12-13.

The Petition for Rejection which was filed by Protestants, and on which they have built an entire argument before the lower Court and are now attempting to do before this Court, is without framework and collapses on only a cursory review of the record.

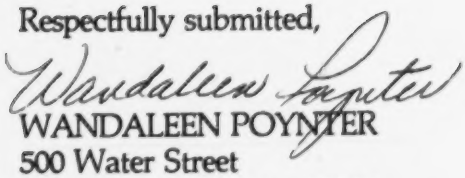
In the pleadings, which were timely and properly filed, the primary basis of protest was that of the reasonableness and lawfulness of the publication under other sections of the Interstate Commerce Act. The Protestants simply did not carry the burden of proof which they are required to carry, [7] by the filing of *verified* protests, to convince the Commission that it should suspend or even that it should investigate.

It is clear that Protestants, realizing the weakness of the protests which had been made within the confines of the Section 15(8) framework sought to place themselves in a position they could not attain properly by filing the Petition to Reject. This was an attempt to pressure the Commission into a full investigation of a rate publication under Section 15(8) rather than an investigation on the single issue of Section 4(1) departures. This fact is evident since the Commission has held that a Section 4(1) violation over one route creates *no* presumption that the rate charged over another route between the same points is unreasonable. *Utah-Idaho Sugar Co. v. Chicago, M. St. P. & P. Co.*, 306 I.C.C. 599, 601-2 (1959).

If the Commission had elected to take the drastic step of rejecting the publication on two alleged violations, to which the railroads had responded by showing conclusively that there were no departures, and late-filed supplementary allegations, it would have been a clearly arbitrary act. This is especially true since the Protestants still had the Commission open to them for the filing of appropriate complaint.

7/ See Seaboard Coast Line Railroad Company, et al., Petition, p. 13, footnote 12.

Respectfully submitted,



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